No. 12,770

IN THE

United States Court of Appeals

For the Ninth Circuit

ETTORE G. STECCONE, an individual doing business under the firm name and style of STECCONE PRODUCTS CO.,

Appellant,

vs.

MORSE-STARRETT PRODUCTS CO., a corporation,

Appellee.

Petition for Rehearing

NAYLOR and LASSAGNE
JAS. M. NAYLOR
Russ Building
San Francisco 4, California
Attorneys for Appellant.

FRANK A. NEAL
Of Counsel.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

No. 12,770

IN THE

United States Court of Appeals

For the Ninth Circuit

ETTORE G. STECCONE, an individual doing business under the firm name and style of STECCONE PRODUCTS CO.,

Appellant,

vs.

MORSE-STARRETT PRODUCTS CO., a corporation,

Appellee.

Petition for Rehearing

To the Honorable William Denman, Chief Judge, and to the Circuit Judges of the United States Court of Appeals for the Ninth Circuit.

The appellant, Ettore G. Steccone, after carefully analyzing the opinion filed in this Court on July 23rd, 1951, respectfully petitions for a rehearing. In support of this petition appellant sets forth the following as broad and

compelling reasons as to why this Honorable Court should grant a rehearing:

1. The lay personnel in the District Court clerk's office will be required to interpret, and thus be given the power to alter the effect of, the memorandum opinions of the District Courts.

2. The appellate jurisdiction of this Honorable Court thus will henceforth be needlessly subjected to doubts.

3. The only safe course for counsel will be: "File an appeal and let all questions of propriety of the same be resolved by the Court of Appeals."

The grounds for this petition are set forth in the following memorandum of points and authorities.

This Honorable Court in its opinion, pages 4 to 6, inclusive, holds that the "Memorandum Opinion" was the final judgment of the Court and as such was duly entered by the clerk, satisfying Rule 79a.

An analysis of that phase of the decision discloses that it rests on four propositions which will not withstand careful analysis. The first three propositions rely on one cited authority each—and in each instance the reliance is misplaced —at least without a further consideration of this matter by this Honorable Court. For the fourth proposition, no authority is cited. It is our purpose here to highlight these deficiencies, since this matter is of importance not alone to your petitioner, but as is evidenced by the large number of cases involving the appealability of orders, to the bar in general.

Before undertaking this task, we wish to indicate our awareness of the following three rules of practice, not in dispute, which should be stated here as background:

1. If a judgment is not final in fact, it will not be rendered so merely by "appropriate" docket entries.

Uhl v. Dalton, 151 F.(2d) 502 (C.C.A. 9);

Wright v. Gibson, 128 F.(2d) 865 (C.C.A. 9, 1942).

2. If the judgment is final in fact, merely filing it with the clerk will not commence the running of the time to appeal.

St. Louis Amusement Co. v. Paramount Film Distributing Corp., 156 F.(2d) 400 (C.C.A. 8, 1946).

3. If the judgment is final in fact, there must be docket entries satisfying Rules 58 and 79(a) in order that an appeal can be taken.

Healy v. Pennsylvania R. R., 181 F.(2d) 934 (C.C.A. 3, 1950) cert. denied, 340 U.S. 935;

Fast, Inc. v. Shaner, 181 F.(2d) 937 (C.C.A. 3, 1950).

The four propositions with which we quarrel may be briefly stated:

I. The "Memorandum Opinion" was a judgment which could become final by due entry in the docket.

II. There was a due entry in the docket.

III. The signature of the District Judge constituted both an "approval and settlement" of form and a direction to the clerk to enter.

IV. The District Court could, despite local Rule 5(d) dispense with the aid of counsel in preparing, approving and settling a judgment of the type herein involved.

I.

THE FINALITY OF THE "MEMORANDUM OPINION"

To reach its holding that the Memorandum Opinion of July 31, 1950 was final, this Court cited and relied on but one case: *In re Forstner,* 177 F.(2d) 572 (C.C.A. 1, 1949). The very pages referred to by this Court, however, contain language which at most indicates only that mandatory language at the end of an opinion may or may not be the final decision of the Court. The test, of finality, in the language of the Court in the *Forstner* case is:

> "Whether such a judgment has been rendered depends primarily upon the intention of the court, as gathered from the record as a whole, illumined perhaps by local rule or practice." (P. 57 of 177 F.(2d))

It should be noted that this is no test of subjective intent. It is one to be applied by looking at the record as a whole; by looking to the local rules and the traditions of practice; and, it is submitted, by considering all of the actions taken or omitted by the clerk of the Court, who plays an indispensable role in perfecting the appealability of the judgment. The role of the clerk is illumined by the recent case of *Fast, Inc. v. Shaner, supra,* in which the Court said, at page 938 of 181 F.(2d):

> "* * * in the interest of practical administration, we note that the instant case highlights the inadvisability of imposing upon lay personnel in the office of the Clerk of the District Court, who make the docket entries, the responsibility of examining the body of an opinion to find dispositive language, and to interpret the intendment of the Court. Rule 79, Federal Rules of Civil Procedure, requires the substance only

of orders and judgments, which are generally terse and definitive, to be entered on the docket; merely the nature of other papers need be noted. Here as in the Healy case, the opinion of the court below was docketed and entered consistent with its title and tenor as an opinion, which is all that could be justifiably required of the Clerks' office, and accordingly the notices necessary under Rule 77(d) with respect to orders and judgments were not sent. We reiterate, the primary responsibility rests upon the litigants to see to it that their record is in proper form at all times."

Applying the aforementioned test, the "Memorandum Opinion" is not a final decision. A recapitulation of the factors indicating "finality" compared with the factors indicating "lack of finality" will demonstrate, it is submitted, the error of this Court in holding that the "Memorandum Opinion" could be made final by due entry.

Factors Indicating Finality

1. *Subjective intent of the District Judge.* This certainly is not a true criterion measured by the foregoing tests. (Cf. *Hoiness v. U. S.,* 165 F.(2d) 504, reversed on other grounds, 335 U.S. 297.)

2. *Mandatory language at conclusion of the opinion.* This is equivocal. *(In re Forstner, supra.)*

3. *Signature of the Judge.* This is equivocal. At the least, it indicates he approved his own opinion. At the most, it is equivalent to settlement and approval *and* a direction to the clerk to enter. The latter we discuss below.

4. *The first of two docket entries of July 31, 1950.* It is dated and contains the substance of the "order" and the

name of the judge. While this may satisfy part of Rule 79(a), below we demonstrate its failure to satisfy *all of* Rule 79(a).

Factors Indicating Lack of Finality

1. *The document was entitled "Memorandum Opinion" and not "Memorandum Opinion and Order" or "Order" or "Judgment."* This is not a point based on empty words alone: Footnote 10 in *Healy v. Pennsylvania R.R., supra,* states:

> "It may be suggested that, where this procedure is adopted, the document might be entitled as an opinion and order, thus removing from lay personnel in the Clerk's Office the responsibility of interpreting the nature, effect and intendment of the document." (P. 937 of 181 F.(2d))

2. *The clerk did not mail notices of entry of judgment to the parties as required by Rule 77(d).* All that was done was to mail the opinion. Formerly, the failure to mail notices of entry was fatal. *Hill v. Hawes,* 320 U.S. 520 (1944). True, the present rule as amended avoids that result. But the failure to send such notices is significant in demonstrating that the clerk did not act as he was obliged to act when dealing with a final order. *In re D'Arcy,* 142 F.(2d) 313 (C.C.A. 3, 1944); *Healy v. Pennsylvania R.R., supra.*

3. *The clerk did not note in the docket the mailing of such notices of entry as required by Rule 77(d).* All that was done was to note the mailing of the opinion. Proper notices of entry were mailed in connection with the original judgment of January 11, 1950 (Tr. of R. p. 129) and also in connection with the order denying appellant's mo-

tion for entry of final judgment (Tr. of R. p. 132). The clerk thus demonstrated that he knew how to act when dealing with a properly submitted final judgment and the parties were thus caused to believe that they could rely upon receiving notices of entry in a situation where a judgment, final within local tradition and practice, was entered.

4. *The clerk did not have the "Memorandum Opinion" microfilmed (a local practice) pursuant to Rule 79(b) requiring that a "correct copy of every final judgment or appealable order * * *" be kept.*

5. *The clerk refused to issue a writ of execution on the "Memorandum Opinion" for attorneys' fees awarded therein until compelled to do so by a special court order.*

6. *RCP 58, as supplemented by local Rule 5(d) was not observed by the District Court or by the prevailing party.* Conformance to rules and practice is specifically enjoined as a condition to the finality of a judgment—particularly where the document is ambiguous. *United States v. Hark,* 320 U.S. 531, 534 (1944); *In re Forstner, supra;* and in *Healy v. Pennsylvania R.R., supra,* the Court states:

> "We are not oblivious of the trend away from those niceties which so often in the past harassed both litigants and the courts. But we are not here insisting upon mere satisfaction of barren formal technicalities. Howsoever liberal we may wish to be, it cannot be gainsaid that certain formalities are indispensable to 'speedy, just, and inexpensive litigation,' and these attributes of our federal judicial system are forthcoming only upon adherence to, rather than upon rejection of, the Rules. It is of the highest importance that the appellate function be free of, and protected from, the needless jurisdictional doubts so simply

> avoidable by compliance with a few specific instructions. The alternative can but induce a laxity destined to obscure the lines of proper appellate conduct, with consequent expense and hardship to the litigants, whose duty it is in the first instance to see to it that the record is in proper form for the relief sought." (P. 936 of 181 F.(2d))

It should be apparent, then, that while the prevailing party rested on the "Memorandum Opinion" — failing, of course, to comply with local Rule 5(d)—the clerk did not act upon it as if it were the judgment of the Court.

In the light of these factors, the "Memorandum Opinion" was not capable of being transformed into a final judgment merely by an "appropriate" docket entry.

II.

THE ENTRY IN THE DOCKET

Even if the "Memorandum Opinion" were a judgment which could become final, the failure of the clerk to enter it properly—the entry only partially satisfying Rules 58 and 79(a)—is fatal and the judgment did not become appealable.

The clerk made two separate and independent entries in the docket on July 31, 1950 (T. of R. pp. 130-1). The first was set forth in dispositive language showing the substance of the Court's order. The second contained no dispositive language, and merely characterized the "Memorandum Opinion." It is clear that under the authorities, e. g., *In re D'Arcy, supra,* the second docket notation would not have been sufficient in and of itself to render the judgment final and appealable.

> "It is necessary that a definitive order or judgment be made and entered in the Court's docket in due form."

The clerk's two entries were made in inverse and illogical sequence. The entries indicate that the "order" preceded the Memorandum Opinion, while, actually, the Memorandum Opinion preceded the "order," which was set forth in the latter part of the opinion.

In making his entries in this manner, the clerk further acted as if the "Memorandum Opinion" were lacking in the qualities of a final judgment.

More importantly, it is submitted that the reversed double entry did not comply with Rule 79(a), requiring that

> "All papers filed * * * orders, verdicts, and judgments shall be noted chronologically in the civil docket . . ."

It is submitted that the word "chronologically" calls for entry in logical and properly ordered sequence, and that it is not sufficient that two entries made on the same day bear the same day of the month date. Such interpretation is clearly supported by the fact that Rule 79(a) elsewhere requires:

> "The notation of an order or judgment shall show the date the notation is made."

Clearly, if the opinion and order were separate papers and were transmitted to the clerk at the same moment, Rule 79(a) requires that the notation of the order be made after the notation of the opinion. The situation is no different where, as here, the order is set forth in the opinion.

The reason for the ordered sequence chronology is obviously for the convenience of all concerned with the docket, i.e., so that they may rely on the last docket notation as

pinpointing the latest status of a case. Petitioner, here, placed such reliance on the second entry, and it was not until the very eve of the hearing on petitioner's motion for entry of final judgment that he learned of the prior order entry.

If the first of the double entries of the clerk is to be given effect, or if both entries, though separate, are to be read together, it would be only logical to also conclude that the due entry by the clerk of a judgment may be made in any vacant space appearing on the folio of the docket assigned to the action, as long as the notation bears its proper date. Such errancy, though violative of the rule, might be overlooked if the clerk were to follow through with the mailing of notices of entry to the parties, but that was not done here.

The failure of the clerk to make proper entry prevented the "Memorandum Opinion," if it was a judgment, from becoming appealable.

III.

THE JUDGE'S SIGNATURE AS CONSTITUTING SETTLEMENT AND APPROVAL OF FORM OF JUDGMENT AND DIRECTION TO ENTER.

A. The case of *J. E. Haddock, Ltd. v. Pillsbury,* 155 F.(2d) 820 (C.A. 9, 1946), brought to this Court's attention after the hearing on appeal, and relied upon by this Court in reaching the conclusion that the "Memorandum Opinion" can properly be treated as a final judgment, is readily distinguishable.

B. Unlike the situation presented in *Haddock v. Pillsbury,* the rules of practice, as applicable to the present case, required the district judge to direct the clerk to enter judgment by something other than his mere signature.

Rule 58 provides, in part:

> "When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk."

Thus Rule 58, in so far as we are concerned with it here, provides for two categories of judgments: one, as in the Haddock case (the complaint was dismissed), where the court "directs that a party recover only money or costs or that all relief be denied," and the other, as in the present case, where the court "directs entry of judgment for other relief," in respect of which latter category Rule 58 goes on to state that "the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk." Since the Haddock case is distinguishable from the present case within the terms of the rule, the ruling of the Court in the former that the Judge's signature constituted a direction to enter judgment is not applicable to the present case.

It is submitted that where, as here, there is a requirement, first, for settlement and approval of the form of judgment, and then for a direction to enter, something more than the Judge's signature on his "opinion" is required in order that there may be due and proper entry of judgment by the clerk.

If this Honorable Court meant to expand the Haddock case ruling to include cases of the second category under Rule 58, the Court is respectfully urged to expressly state

this in order that this point of procedural law may be clarified for the guidance of future litigants. If, on the other hand, the Court did not intend to expand the Haddock rule, then the Haddock case has been misapplied to the case at bar.

IV.

AS TO WHETHER THE DISTRICT COURT COULD, DESPITE LOCAL RULE 5(d), DISPENSE WITH THE AID OF COUNSEL IN PREPARING, APPROVING AND SETTLING A JUDGMENT OF THE TYPE HEREIN INVOLVED.

In its opinion, this Honorable Court reached the conclusion that the activities of the parties in respect to settlement and approval, as called for by local Rule 5(d) are merely in aid of the district court, and that the court may decline such aid by unilaterally playing all of the roles in connection with settlement and approval. Since this Court has cited no authority in support of this conclusion, the soundness of the same must be tested by looking to the relation between RCP 58 and local Rule 5(d), and the mandatory language in which local Rule 5(d) is couched.

(a) The Relation of Local Rule 5(d) to RCP 58.

The authority for the adoption of local rules of practice by the various district courts is set forth in RCP 83, which provides:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules."

Pursuant to this authority, the local Rules of Practice of the United States District Court for the Northern Dis-

trict of California were adopted and became effective on July 1st, 1944. It is expressly stated in the forepart of these rules that they supplement the Rules of Civil Procedure. As these latter rules existed in 1944, local Rule 5(d) supplemented RCP 58 so far as the previously mentioned second category of judgments of the latter was concerned.

Since the time of adoption of the local rules, both the local rules and the RCP have undergone certain amendments. The local rules were amended on November 1, 1949, but Rule 5(d) was not amended. RCP 58 was amended in 1947, but there was no change in the substance of the rule, two changes in the rule having been made merely to clarify the practice thereunder. (See commentary note at page cxviii of 10 FRS.)

There having been no change in substance in RCP 58 and no change at all in local Rule 5(d), the latter still supplements the former. Furthermore, since local Rule 5(d) was adopted under RCP 83, containing the proviso that local rules be not inconsistent with the RCP, it must be presumed that there was no inconsistency between local Rule 5(d) and RCP 58 when the former became effective. This presumption carries down to the present time, as there has been no change in either rule which raises a conflict between them.

It is to be concluded, therefore, that local Rule 5(d) and RCP 58 must be read together, since each is a necessary component of the procedural law relating to the entry of those judgments "for other relief." The local rule sets forth in more specific detail within the broader outline of RCP 58 what must be done to conform the procedure to the requirements of law.

(b) The Mandatory Language of Local Rule 5(d).

Having seen that the local rule and RCP 58 go "hand in glove" together and that the term "local rule" is merely a name applied to a separately located portion of RCP 58, it will be well to take a detailed look at the local rule to see the stress laid upon the roles to be played by the parties in settlement and approval of the forms of orders or judgments, and the tenor of the language outlining these rules. The rule, pertinent portions of which are appropriately italicized, states:

> "Within five days of the decision of the Court giving an order which requires settlement and approval as to form, the *prevailing party shall* prepare a draft of the order or judgment embodying the Court's decision and present it for approval to each party who has appeared in the action. *Each party* shall examine it at once, and if he approves, endorse with the words 'Approved as to form, as provided in Rule 5(d),' and append his signature thereto. *Such endorsement shall not affect the rights of any party, but shall be* considered only as an indication to the Judge that the form is correct. If *any party* does not approve, he *shall* endorse with the words 'Not approved as to form, as provided in Rule 5(d)', specifying his reasons. The party proposing the order or judgment *shall* thereupon serve a copy upon each other *party,* and lodge the original and one copy with the Clerk. *Each party* who disapproves the order or judgment *shall* have five days within which to serve and lodge with the Clerk proposed modifications thereof. If *all parties* approve, or if no modifications are presented within said five days, the order or judgment, if approved by the *Judge, shall* be signed and filed by him. *If any proposed modifications of the order or judg-*

ment are presented as herein provided, the judge shall order such modifications made as he deems proper. If the attorney for the *prevailing party* fails to observe the above provisions, any attorney in the case may submit to the Judge a draft of the proposed order or judgment."

The language of the rule apparently leaves no room for the interpretation that the activities of the prevailing party are permissive only, nor is there any room for the prevailing party to decline to prepare a draft of the order or judgment embodying the Court's decision. It will be noted that the Judge has no activity to perform in connection with settlement and approval until the parties first approve or disapprove the form of order or judgment.

In the present case we have the anomalous situation of the prevailing party failing to discharge a required duty, and being enabled by the Court to benefit from its failure.

The district court, in the absence of local Rule 5(d) could by virtue of its inherent power seek the aid of the parties in drafting a suitable judgment. The fact that Rule 5(d) is set forth in such positive and mandatory terms is indicative of the fact that the roles to be played by the parties in the preliminary steps of settlement and approval are for the benefit of the parties, amounting to an actual right. Stated otherwise, the effect of the supplementation of Rule 58 by local Rule 5(d) is that the Court's office of settling and approving the forms of orders and judgments has been, in its formative stages, mandatorily delegated to the parties. If this is so, then the Court may not waive these rights for the parties. The court, having by action of a majority of its judges made and adopted its own

clearly defined rules for the guidance and benefit of parties litigant, must itself abide by and be satisfied with them. The rules are not "a looking glass" to a judicial "never-never" land.

Having seen that conformance to rules and practice is specifically enjoined as a condition to the finality of a judgment *(United States v. Hark; In re Forstner; Healy v. Pennsylvania R.R.,* all *supra),* and having seen the nature of the local rule and the failure of the district court and the prevailing party to observe the same, it can only be concluded that there has been no final judgment in this case.

CONCLUSION

In view of the above considerations, a granting of the petition for rehearing and a favorable reconsideration of what this Honorable Court has treated as a petition for a writ of mandamus are respectfully solicited.

NAYLOR and LASSAGNE
JAS. M. NAYLOR
Attorneys for Appellant and Petitioner.

FRANK A. NEAL
Of Counsel.

Dated August 22, 1951.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for appellant and petitioner in the above-entitled cause and that in my judgment the foregoing petition is well founded in point of law as well as in fact and that it is not interposed for delay.

JAS. M. NAYLOR

Dated: August 22, 1951.